NOTES

AN EXTENSION OF THE DOCTRINE OF DE FACTO CORPORATIONS.—Although the doctrine of *de facto* corporations is firmly established in this country, the rules governing its application are by no means free from doubt. Clearly such a doctrine is not strictly reconcilable with the law as laid down in legislative *fiat* and apparently has never been accepted in England.[1] In this country, however, the *de facto* corporation has been recognized as a legal organization with a standing against all the world except the state.[2] Various theories have been raised in its defense, but the basis of its existence may be safely ascribed to a belief that it is in the interests of modern business mechanism, that substantial efforts to achieve corporate franchise should be awarded at least a qualified legality, both in behalf of third persons dealing with such a corporation, and the corporation itself.[3] But in order to avail itself of such privileges, certain requisites must have been complied with, namely, there must have been an existing law under which a corporation might have been formed, a colorable attempt in good faith to comply with that law, and a subsequent user by the corporation.[4] And it would seem, there is no greater difficulty in the continuance of a corporation *de facto* after its *de jure* existence has ceased than in the existence of such corporation as *de facto* from its inception,[5] unless the termination of the *de jure* status has been effected by positive affirmative action of the state.[6] Thus where a corporation's charter expires, unless the legislature has expressly declared the corporation terminated,[7] if the necessary ele-

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[1] Machen, Modern Law of Corporations, 241.

[2] "A de facto corporation is a reality. It has an actual and substantial legal existence." Society Perun *v.* Cleveland (1885) 43 Ohio 481, 490, 3 N. E. 357.

[3] 20 Harvard Law Rev. 456, 469.

[4] Von Lengerke *v.* City of New York (1912) 150 App. Div. 98, 134 N. Y. Supp. 832; Finnegan *v.* Noerenberg (1893) 52 Minn. 239, 53 N. W. 1150, criticizing the requisites as defined in Methodist Episcopal Union Church *v.* Pickett (1859) 19 N. Y. 482.

[5] Wilson *v.* Brown (1919) 107 Misc. 173, 175 N. Y. Supp. 688; Bushnell *v.* Consolidated Ice-Machine Co. (1891) 138 Ill. 67, 27 N. E. 596.

[6] Newhall *v.* Western Zinc Mining Co. (1912) 164 Cal. 380, 128 Pac. 1040.

[7] The word forfeiture has been loosely applied to include mere causes of forfeiture, whereas a forfeiture is the actual loss of the charter. At common law, the existence of a *de facto* corporation could not be disputed except in a direct judicial determination. Eaton *v.* Aspinwall (1859) 19 N. Y., 119; Oroville & V. R. R. *v.* Plumas County (1869) 37 Cal. 354; Elizabethtown Gas Light Co. *v.* Green (1889) 46 N. J. Eq. 118, 18 Atl. 844. Nor could a cause of forfeiture terminate corporate life until there had been such a judicial proceeding, Heard *v.* Talbot (1856) 73 Mass., 113; and the common law in this respect has been codified. Rippstein *v.* Haynes Medina Valley Ry. (Tex. 1905) 85 S. W. 314. Where, however, the legislature in the strongest language provides for a forfeiture *ipso*

ments are present, there is strong authority for treating such a corporation, if it continues to do business, as *de facto*.[8]

It follows that the matter of forfeiture is clearly distinct from the mere expiration of the corporate charter. The duration of a corporation is a part of the mass of regulations prescribed by the legislature, to regulate the conduct of corporations to be formed subsequently. But for the existence of the doctrine of corporations *de facto*, violations of such conditions of corporate existence might well be held to end corporate rights and franchises. But the effect of the doctrine is merely to lay an offending corporation open to the attack of the state.[9]

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facto after mis-user or non-user, such a cause of forfeiture will amount to an actual forfeiture itself, Brooklyn Steam Transit Co. v. City of Brooklyn (1879) 78 N. Y. 524; Matter of Brooklyn, Winfield & Newton Ry. (1878) 72 N. Y. 245; but such cases of forfeiture *ipso facto* seem to be confined to cases where a public utility asserts some right requiring of it a *de jure* status; Brooklyn Steam Transit Co. *v.* City of Brooklyn, *supra;* Matter of Brooklyn, Winfield & Newton Ry., *supra;* and even here, only the most unqualified language will be construed to work a forfeiture. Smith *v.* N. Y. & L. I. Bridge Co. (1896) 148 N. Y. 540, 42 N. E. 1088; Utah, N. & C. R. R. *v.* Utah & C. Ry. (C. C. 1901) 110 Fed. 879, Furthermore, the legislature may authorize some executive act, such as a proclamation by the Governor, to take the place of a judicial proceeding, and then such an act is competent to terminate all corporate privileges. Kaiser Land & Fruit Co. *v.* Curry (1909) 155 Cal. 638, 103 Pac., 341; Lewis *v.* Curry (1909) 156 Cal., 93, 103 Pac. 493; Lewis *v.* Miller & Lux (1909) 156 Cal. 101, 103 Pac. 496. But where the statute provides for such an executive act after failure by the corporation to pay its license tax, P. L. Cal. (1905) c. 386, amended P. L. Cal. (1907) c. 347, 403; now superseded by P. L. Cal. (1917) c. 215, the failure by itself, without executive act, will not end the life of the corporation. Alaska Salmon Co. *v.* Standard Box Co. (1910) 158 Cal. 567, 112 Pac. 454. *Cf.* State *v.* Howell (1912) 67 Wash. 377, 121 Pac. 861, where the statute was interpreted as not authorizing a forfeiture by an executive act. Rem. 1915 Code, Sec. 3715.

[8] Wilson *v.* Brown, *supra,* footnote 1. Here whereas the charter limited the company to twenty years existence, it did business beyond that period, but in view of the fact that the general law permitted corporations to continue for fifty years, *de facto* existence was recognized. But see Sturges *v.* Vanderbilt (1878) 73 N. Y. 384. See Arlington Hotel Co. *v.* Rector (1916) 124 Ark. 90, 186 S. W. 622, where the general law put no limit on the duration of corporate privileges. But where the general law named a twenty year limit when no other was placed in the charter, there can be no *de facto* existence thereafter. Bradley *v.* Reppell (1896) 133 Mo. 545, 32 S. W. 645; *cf.* St. Louis Gas Light Co. *v.* St. Louis (1881) 11 Mo. App. 55; affirmed (1884) 84 Mo. 202; Krutz *v.* Paola Town Co. (1878) 20 Kan. 397. Where a statute permitted corporations to continue beyond their chartered limitation to wind up their affairs, a corporation which went on doing new business was held to be a *de facto* organization. Miller *v.* Newburg Orrel Coal Co. (1888) 31 W. Va. 836, 8 S. E. 600; *contra,* Ewald Iron Co. *v.* Commonwealth (1910) 140 Ky. 692, 131 S. W. 774. But where the time for bringing suits has expired, the corporation is neither *de jure* nor *de facto*. Shore Line R. R. *v.* Maine Cent. R. R. (1899) 92 Me. 476, 43 Atl. 113.

[9] Eaton *v.* Aspinwall, *supra,* footnote 7; Oroville & V. R. R. *v.* Green, *supra,* footnote 7; Elizabethtown Gas Light Co. *v.* Green, *supra,* footnote 7.

On the other hand, a forfeiture, properly speaking, is a procedure authorized by the legislature to take advantage of that class of violations, which by themselves, merely render a corporation *de facto* as opposed to *de jure*. It is the actual attack against a *de facto* corporation, and to question its finality would be tantamount to questioning the ability of the state to put an end to a *de facto* corporation at all. Under such a construction, a *de facto* corporation would enjoy an immunity wholly comparable to that of the *de jure* corporation itself.

The distinction between the corporation which owes its legal standing to the non-interference of the state and the corporation which has been outlawed by the affirmative action of the sovereign power seems to have been lost sight of in the recent case of *Held* v. *Crosthwaite et al.* (C. C. A. 2nd Dist. 1919) 61 N. Y. L. J. 1671. The defendants lost their corporate franchise by a proclamation of the governor after two years' failure to pay taxes pursuant to statute,[10] but in ignorance of this, continued business as a corporation. Subsequently the taxes having been paid, the defendants were reinstated as a corporation. In a suit against the defendants as individuals, on a cause of action arising after the revocation of their charter, but before reinstatement, the court held that between the time of the forfeiture and the reinstatement there was at least a *de facto* corporation and defendants were not individually liable.

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[10] N. J. Comp. Stat. (1910) pp. 5293-4-5, par. 512-515, 518; amended Supp. N. J. Comp. Stat. (1911-1915) p. 1534, par. 133:

Sec. 1. If any corporation created under any act of this state shall for two consecutive years neglect or refuse to pay the state any tax . . . assessed against it . . . the charter of such corporation shall be declared void as in section two . . . unless the governor shall, for good cause shown to him give further time for the payment of such tax. . . .

Sec. 2. . . . the comptroller shall report to the governor a list of all corporations which for two years next preceding such report have failed . . . to pay taxes assessed against them . . . and the governor shall forthwith issue his proclamation declaring . . . that the charters of these corporations are repealed, and all powers conferred by law upon such corporations shall thereafter be deemed inoperative and void.

Sec. 3. The proclamation of the governor shall be filed in the office of the secretary of state.

Sec. 4. Any person or persons who shall exercise or attempt to exercise any powers under the charter of any such corporation after the issuing of such proclamation, shall be deemed guilty of a misdemeanor and shall be punished . . .

Sec. 7. If the charter of any corporation . . . shall . . . become inoperative or void by proclamation of the governor . . . for non-payment of taxes, the governor, by and with the advice of the attorney-general, may upon payment by said corporation to the secretary of state of such sum in lieu of taxes and penalties as to them may seem reasonable, but in no case to be less than the fees required as upon the filing of the original certificate of corporation, permit such corporation to be reinstated and entitled to all its franchises and privileges, and upon such payment as aforesaid the secretary of state shall issue his certificate entitling such corporation to continue its said business and its said franchises; . . .

Cf. P. L. Cal. (1905) c. 386.

It would seem clear that a corporation whose charter has been revoked by affirmative act has ceased to exist, whether dissolution be by judicial decree or statutory forfeiture.[11] Apart from the reinstatement, the instant corporation ceased to exist by reason of the Governor's revoking its charter. How a corporation thus extinguished could come to life again, seems hard to conceive. The fact that the defendants acted in good faith can make no difference in view of the unqualified language of the statute.[12] And this view is further strengthened by the provision making continued use of a franchise after its revocation, a criminal offense, irrespective of any knowledge or intent.[13] Nor can any authority be found for the proposition suggested by the court that the reinstating proclamation related back as from the time of the forfeiture.[14] The doctrine of relation back is at best a fiction and should not be favored.

The court further suggests that unless it held that the forfeiture was like a mere suspension of the right to do business, and that the reinstatement related back to the time of suspension, such reinstatement would necessarily be invalid as a delegation of the legislative

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[11] Newhall *v.* Western Zinc Mining Co., *supra,* footnote 6.

[12] Sec. 3 of the New Jersey statute, *supra,* footnote 10, merely provides that the Governor's proclamation be filed with the Secretary of State. In its original form, P. L. 1905, 508, this section provided that the proclamation be "published in such newspapers and for such length of time as the governor shall designate." But as later amended, P. L. 1914 c. 14, this provision was stricken out so that today there is no provision as to notification of the corporation.

[13] See Sec. 4 of the New Jersey Statute, *supra,* footnote 10.

[14] An attempted exercise of corporate powers between the expiration of a charter and its renewal was held void, the court not discussing the possibility of the renewed charter relating back to the time of expiration. United Brothers *v.* Williams (1906) 126 Ga. 19, 54 S. E. 907. Nor is the theory of relation back allowed to permit a corporation to ratify a contract made by an agent in its name before it was incorporated. Bradley Fertilizer Co. *v.* South Pub. Co. (N. Y. 1892) 17 N. Y. Supp. 587. Where a charter expired in 1839 and was renewed in 1846, a corporation which by statute was entitled to benefit from any escheat, was permitted to claim realty which escheated in 1842 upon the renewal of its corporate life, but quite apart from any theory of *de facto* existence between 1839 and 1846. Brown *v.* Chesterville Academy Society (S. C. 1851) 3 Rich. 362. However, where a corporation filed a petition for renewal before the expiration of its charter, and through no fault of its own, the renewal was not made for two years, the new charter was held to relate back to the date of filing. St. Philip's Church *v.* Zion Presbyterian Church (1885) 23 S. C. 297. Although there are no cases suggesting such a doctrine as the court applied in the principal case, the wording of the revised California statute is suggestive. Originally it had been practically identical with the New Jersey statute under consideration, but was later amended to the effect that "the revivor of a corporation . . . shall be without prejudice to any action or proceeding, defense or right which has occurred by reason of any forfeiture." P. L. 1917 c. 215, sec. 14. Such wording is significant for it may be contended that the legislature thought that but for such a provision, there would be a deprivation of rights which had accrued in the *interim* by application of the fiction of relation back, a thing they specifically sought to avoid.

power of granting charters. For if the old charter had been revoked, contends the court, the reinstatement amounts to the grant of a new charter by an executive officer. But it would seem that as the legislature has precisely defined under what circumstances the Governor may reinstate the corporation, such circumscribed power is no more than ministerial.[15] When ministerial acts are to be performed, their delegation is not unconstitutional.[16] And in this case where the Governor was authorized to reinstate a corporation on payment of a reasonable sum, in no case less than the amount of the fee required upon the filing of the original certificate of incorporation, the legislature has merely given the Governor executive functions.

It might seem that, having recognized the anomalous doctrine of *de facto* corporations, there would be no reason for not extending its effect to the present situation. It is true, it plays a large part in modern business operations, but the doctrine of *de facto* corporations is a dangerous one and must be guarded carefully. For, unrestrained, it might easily reach a point where as a practical matter, decrees of corporate dissolution would be impotent.

THE MEANING OF INTERSTATE COMMERCE IN THE FEDERAL EMPLOYERS' LIABILITY ACT.—The Federal Employers' Liability Act of 1906[1] was declared unconstitutional[2] for the reason that it applied to employees of interstate carriers, whether those employees were employed in interstate or intrastate commerce. The present Act of 1908,[3] however, providing that "every common carrier by railroad while engaged in commerce between any of the States or Territories . . . shall be liable in damages to any persons suffering injury while employed by such carrier in such commerce", has obviated that difficulty.[4] Plainly, by the terms of the statute, a right to recovery thereunder arises only where it appears that at the time of the injury, both the carrier and the employee were engaged in interstate commerce.[5] It is not sufficient that the employee was immediately

[15] Sec. 7 of the New Jersey Statute, *supra*, footnote 10.

[16] Jackson *v.* Whiting (1904) 84 Miss. 163, 36 So. 611; Schaake *v.* Dolley (1911) 85 Kan. 598, 118 Pac. 80; see Smith *v.* Wortham (Tex. 1913) 157 S. W. 740.

[1] 34 Stat. 232.

[2] The Employers' Liability Cases (1908) 207 U. S. 463, 28 Sup. Ct. 141.

[3] 35 Stat. 65, Comp. Stat. §8657.

[4] Second Employers' Liability Cases (1912) 223 U. S. 1, 32 Sup. Ct. 169.

[5] Pedersen *v.* D. L. & W. R. R. (1913) 229 U. S. 146, 33 Sup. Ct. 648. ". . . from the very nature of the question, his employer, at the moment of the injury, must be engaged in interstate commerce, not generally, but in the specific instance and in that identical commerce he (employee) must be injured if he recovers under the statute." Thornton, The Federal Employers' Liability and Safety Appliance Act, §28. "It is true that the act is applicable to carriers only 'while engaged' in interstate commerce, but . . . if the employee was engaged in such commerce, so was the road, for the road was the master, and the servant's act its act." Calasurdo *v.* Central R. R. of N. J. (C. C. 1910) 180 Fed. 832, 838.